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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 140

FEDERAL BROADCASTING SYSTEM, INC., *Petitioner*,

v.

AMERICAN BROADCASTING CO. INC., and
MUTUAL BROADCASTING SYSTEM.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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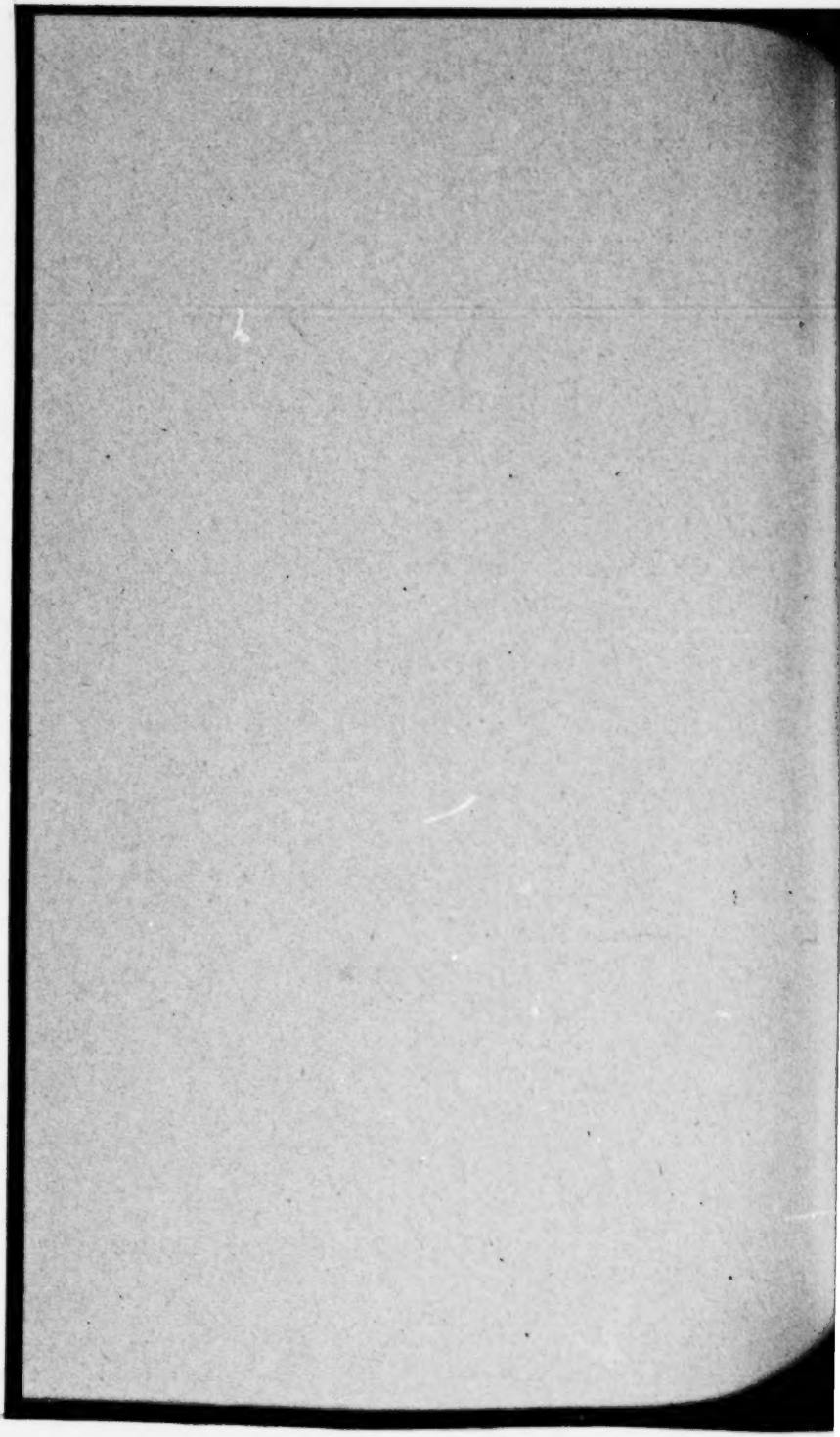

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Federal Broadcasting System, Inc., prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause April 8, 1948 (R. 171), which affirmed a judgment of the United States District Court for the Southern District of New York entered on November 12, 1947 (R. 149).

Opinion.

The opinion of the Circuit Court of Appeals (R. 167-171) is reported in 167 F. 2d 349 (1948).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 8, 1948 (R. 171). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

This petition questions the correctness of the decision of the Court below in holding:

(1) That the four existing national radio networks do not violate the Sherman Act by fixing the price which a radio broadcast station licensed by the Federal Communications Commission (hereinafter referred to as FCC) shall charge national advertisers who purchase broadcast time over the station's facilities;

(2) That the four existing national networks do not violate the Sherman Act by engaging in a series of exclusive arrangements which require their respective national advertisers to deal exclusively with their respective affiliated stations with the purpose and effect of excluding unaffiliated stations from all access to the national advertising market;

(3) That the FCC's Chain Broadcasting Regulations as interpreted by this Court in *NBC* v. *United States*, 319 U. S. 190 (1943), sanction the price-fixing and exclusive practices of the networks;

(4) That the uniform participation by the four existing national radio networks, each with knowledge the other is so doing, in a particular system of doing business which has the effect of denying independent radio stations all access to the national advertising market, does not constitute, at least prima facie, a conspiracy in violation of the Sherman Act.

Statutes Involved.

The pertinent statutes are printed in the Appendix, infra, pages 10 and 11.

Statement.

The petitioner is the owner of radio broadcast station WSAY at Rochester, New York, and brought an action against the four existing national chain broadcasting networks, National Broadcasting Company, Columbia Broadcasting System, Inc., Mutual Broadcasting System and American Broadcasting Company, Inc. (hereinafter referred to as NBC, CBS, Mutual, ABC) and two of their officers. It sought treble damages and a permanent injunction against all of them for violation of Sections 1 and 2 of the Sherman Act. It charged that by their concerted action these networks had unlawfully linked together substantially all important broadcasting stations and national advertisers by a series of mutually exclusive contracts and had used their resulting powers to dictate arbitrarily the price at which all broadcasting facilities would be available to national advertisers with the purpose and effect of excluding station WSAY from the national advertising market (R. 168).

For some time prior to the present action the four existing national chain networks furnished programs for the three broadcasting stations then existing in Rochester. NBC and CBS each had one of these stations as an exclusive affiliate; WSAY secured programs under special non-affiliate agreements with the remaining two networks, ABC and Mutual. The arrangement with each of these two networks permitted the petitioner to set the price to be charged advertisers for the use of its facilities and gave the networks a fifteen per cent selling commission. The two networks sought unsuccessfully to obtain a "standard" affiliation contract with the petitioner on terms comparable to those they had with their other affiliated stations. Petitioner refused these offers because they did not give to it the right to negotiate with advertisers the rate to be charged for the use of its station (R. 168).

In May and June, 1947, the FCC authorized two new stations in Rochester, with which ABC and Mutual immediately entered into "standard" network affiliation contracts. Thereupon, both networks on the same day notified WSAY that they would both cut WSAY off from further access to national advertisers then purchasing time over petitioner's station (R. 45, 169). As noted by the Court below, because NBC and CBS had constantly made that part of the national advertising market controlled by them exclusively available to their respective affiliates in Rochester, petitioner's station had been compelled to rely upon ABC and Mutual for access to the national advertising market. The effect, therefore, of ABC and Mutual simultaneously cutting WSAY off from access to that part of the national advertising market controlled by them was automatically to deny WSAY any access whatsoever to the national advertising market, the market which a broadcast station must reach if it is to survive. (R. 46-48)

To prevent ABC and Mutual, pursuant to the alleged conspiracy, from severing WSAY's existing relationships with national advertisers then purchasing time over its facilities, WSAY moved in the District Court for a temporary restraining order and for a preliminary injunction, pendente lite (R. 24-27). The District Court issued a temporary restraining order (R. 28-29), but, upon hearing, denied a preliminary injunction (R. 149). Upon appeal, the Circuit Court affirmed the judgment of the District Court (R. 171).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

(1) In holding that the four existing national chain networks have the right to fix the price that independently owned radio broadcast stations may charge national advertisers for broadcast time;

(2) In holding that the four existing national chain networks have the right to exclude unaffiliated stations from all access to the national advertising market;

(3) In holding that the FCC's Chain Broadcasting Regulations sanction the price-fixing and exclusive practices of the national chain networks;

(4) In holding that the common pursuit by the four existing national chain networks, each with knowledge the other is so doing, of a uniform course of dealing which results in the complete exclusion from the national advertising market of unaffiliated stations does not constitute, at least prima facie, a conspiracy in violation of the Sherman Act;

(5) In affirming the judgment of the District Court.

Reasons for Granting the Writ.

This case is predicated upon both the antitrust laws and the Communications Act of 1934 (47 U. S. C. Sec. 313) which makes the antitrust laws specifically applicable to the broadcasting industry and invests the Courts of the United States with jurisdiction to revoke the license of any licensee found guilty of violating those laws. Despite the explicit provisions of the Communications Act, the Circuit Court of Appeals held that the FCC's Chain Broadcasting Regulations had largely immunized the national chain networks from the impact of the ordinarily applicable principles of antitrust law—and this in the face of the fact that the FCC admittedly has no jurisdiction over the networks.

The Record and the Circuit Court's opinion reflect that because NBC and CBS consistently dealt exclusively with their respective Rochester affiliates, petitioner was for many years compelled to seek access to the national advertising market via ABC and Mutual (R. 168). These two networks repeatedly tendered to petitioner a "standard" affiliation contract which uniformly conveyed to the networks the right to fix the price which national advertisers should pay for broadcast time purchased over petitioner's station. In fact, the record reflects that ABC sought to force WSAY to accept a "standard" affiliation contract which contained the following clause (R. 38-42, Ex. 21, p. 2):

> We [ABC] reserve the right to change at any time your network station rate to advertisers from that set forth in the preceding table.

Petitioner persistently declined to permit the networks to dictate its price to advertisers because it believed such surrender of control over its station rate was clearly inconsistent with the policies announced in the FCC's Chain Broadcasting Report where the Commission stated (*NBC* v. *United States*, 319 U. S. 190, 209):

> It is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers.

However, as the lower Court's opinion recites, petitioner was finally excluded from access to even that portion of the national advertising market controlled by ABC or Mutual solely because it refused to surrender "the right to fix the rate to be charged an advertiser for the use of its station" (R. 168).

As with price-fixing, so with exclusive dealing practices, the record and the lower Court's opinion reflect equally clearly that the networks' uniformly exclusive arrangements with their respective advertisers and affilated stations deny an unaffiliated station all access to the national advertising market (R. 45-46, 169). The necessary effect of such exclusive practices is that petitioner is precluded from broadcasting even those programs which the networks' exclusive affiliates in Rochester refuse to broadcast and which the advertiser and the listening public desire to have broadcast over WSAY. For example, solely because WSAY was not a "standard" affiliate of ABC, that network refused to permit WSAY to broadcast the Boston Symphony Orchestra program, which was not being heard in Rochester, despite the fact that the advertising sponsor specifically authorized WSAY to broadcast the program (R. 40, 135).

Such exclusive practices, of course, stand in sharp contradistinction to the conclusion of this Court in *NBC* v. *United States*, supra, p. 200, that the effect of such practices "designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available". Such exclusive practices also exist in the teeth of the conclusion of the FCC in its Chain Broadcasting Report (p. 59) that:

> It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing to broadcast the programs. It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference.

The Court below ruled that undisputed proof of uniform action by the networks did not constitute a prima facie showing of concerted action because it concluded that the FCC's Chain Broadcasting Regulations "specifically sanctioned", if they did not require, uniform action by the network (R. 170). However, analysis of the Chain Broadcasting Regulations, as interpreted by this Court in *NBC* v. *United States, supra,* demonstrates that not only did the Chain Broadcasting Regulations not sanction the price fixing or exclusive dealing practices of the networks, but, in fact, were explicitly designed to preclude network indulgence in the very practices complained of by petitioner. To hold, as the Court below did, that the Chain Broadcasting Regulations sanction uniform indulgence by the networks in the practices complained of here is to hold that the Regulations sanction their own circumvention. Even a cursory reading of the FCC's Chain Broadcasting Report and this Court's decision sustaining the validity of the Regulations issued thereunder permits of no doubt that the FCC went

to extreme lengths, in the absence of any jurisdiction over the networks per se, to prevent the networks from controlling the rates which the independently owned licensees should charge advertisers for broadcast time. To deliver into the hands of the four existing national networks the power arbitrarily to dictate the price which all of the independently owned station licensees shall charge national advertisers on the ground that such control is sanctioned by the Chain Broadcasting Regulations is not only to frustrate the purposes sought to be served by those Regulations, but is actually to pervert the Regulations to justify the very practices the Regulations were designed to prevent.

In fact, the Circuit Court's decision goes so far in validating the allegedly unlawful practices of the networks, that even if petitioner could adduce additional evidence of concert action over and above the voluminous documentary proof brought forward in support of its moving papers in the Court below, petitioner still would be denied any relief, *legal or equitable*. The Circuit Court held "these cancellations resulted because plaintiff was unwilling to enter into affiliation agreements as each defendant desired and had a right to require as a condition of its contracting to furnish programs" (R. 170). If, in the face of the plain requirements of the Sherman Act, each network was free through the device of uniformly exclusive affiliation contracts, to acquire exclusive control over that part of the market served by it, obviously all four networks in the aggregate completely exclude any non-affiliated station from any access to the national advertising market. The quality and scope of the exclusion thus practiced upon a non-affiliated station is precisely the same, whether the networks pursue their course of exclusive dealings individually or in concert. The Circuit Court's decision therefore, would bar petitioner proving any special damage, even if its exclusion resulted from concerted action, since, as an unaffiliated station, it would have been excluded in any case.

Thus, as a result of its erroneous view of the scope and function of the Chain Broadcasting Regulations, the Court below not only declined to test the facts at bar against the clearly applicable principles of antitrust law, but it departed sharply from the recent holdings of other Circuits and of this Court in refusing to hold that common participation by the four existing national chain networks, each with knowledge the other was so doing, in a uniform course of dealing which completely excludes unaffiliated stations from the national advertising market does not constitute, at least prima facie, a conspiracy in violation of the Sherman Act. *Goldman Theatres* v. *Loew's, Inc.*, 150 F (2d) 738 (CCA3, 1945); *Bigelow* v. *RKO Radio Pictures*, 150 F (2d) 877 (CCA7, 1945); *American Tobacco* v. *United States*, 147 F (2d) 93 (CCA6, 1944), aff. 328 U. S. 781, 66 S. Ct. 1125 (1946). Under the circumstances, the Circuit Court's decision operates to bar petitioner from any relief under the antitrust laws and to render further protraction of the litigation in the District Court futile.

It is submitted that the Circuit Court's decision does such violence to accepted principles of antitrust law and to the clear meaning and intent of the FCC's Chain Broadcasting Regulations, which purport to regulate the contractual relationships between approximately one thousand radio stations and their respective networks, that an immediate review of that decision by this Court is essential in the public interest embodied in the antitrust laws and the Communications Act of 1934.

Respectfully submitted,

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APPENDIX.

Sherman Anti-Trust Act.

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court. (15 U. S. C. Sec. 1.)

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (15 U. S. C. Sec. 2.)

Clayton Act.

SEC. 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue: * * * (15 U. S. C. Sec. 26.)

Federal Communications Act.

Application of antitrust laws to manufacture, sale, and trade in radio apparatus; revocation of licenses.

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court. (47 U. S. C. Sec. 313.)

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Opinions Below.

This proceeding is a petition that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in this case on April 8, 1948 (R. 171). The opinion of the Circuit Court of Appeals (R. 167-171) is reported in 167 F. (2d) 349 (1948). That Court affirmed an order, entered on November 12, 1947, by the United States District Court for the Southern District of New York, denying Petitioner's motion for a preliminary injunction (R. 149).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code.

Question Presented.

The sole question is whether the Circuit Court erred in its conclusion, "we have no reason to suppose [the District Judge] abused his discretion in the present case" and in thereby affirming the order denying petitioner's motion for preliminary injunction.

Statutes Involved.

The statutes involved are the Sherman Act, 15 U.S.C. §§ 1, 2; the Clayton Act, 15 U.S.C. § 26; and the Federal Communications Act, 47 U.S.C. § 313.

Statement.

This is an interlocutory proceeding in an action for treble damages and for a preliminary and permanent injunction based upon an alleged conspiracy to violate the Sherman Act. Petitioner, licensee of radio station WSAY in Rochester, New York, alleged that the four national networks[1] were engaged in an illegal conspiracy to exclude radio stations from the national advertising market except at prices dictated by them (R. 18-19). The Petitioner further alleged that because it would not submit to such dictation, the networks, in pursuance of the asserted conspiracy, agreed to boycott Station WSAY (R. 19-20). Treble damages and permanent injunctive relief were prayed against all four networks and a preliminary injunction to restrain the alleged boycott was asked against the

[1] These are the National Broadcasting Company ("NBC"); Columbia Broadcasting System, Inc. ("CBS"); Mutual Broadcasting System ("Mutual"); and American Broadcasting Co., Inc. ("ABC"). Only the latter two are Respondents here.

two Respondents here (R. 22-23). The only matter so far adjudicated is the prayer for a preliminary injunction in support of which Petitioner submitted ex parte affidavits and annexed documents (R. 30-59; Exs. 1-37). The Respondents filed counter affidavits and incorporated documents which specifically denied the allegations of conspiracy (R. 59-149, 65-66, 74-78, 90, 94-98).

The relevant facts shown by the record, and in areas of dispute determined by the court below (R. 167-171), are as follows:

Prior to the events involved in this proceeding there were three radio stations in Rochester, of which two were regularly affiliated with networks NBC and CBS (R. 91). The third station, Petitioner's WSAY, was regularly affiliated with Respondent Mutual until January, 1943 (R. 70). Thereafter, WSAY declined offers of affiliation from both Respondents ABC and Mutual (R. 42, 43, 72, 91, 92), instead doing business upon its own terms with both ABC and Mutual on a non-affiliated basis (R. 72, 73, 80, 81, 93 and Ex. 19). Until 1947, Petitioner dictated terms which Respondents considered exorbitant, which it was able to do because of Station WSAY's monopolistic position as the only unaffiliated outlet for these networks in Rochester (R. 67-68, 71-73, 78, 82-84 and 115). In April and May 1947, the Federal Communications Commission, pursuant to applications filed in December 1943 and May 1946 (R. 94, 163), licensed two new stations, WARC and WVET, in Rochester (R. 92). Subsequently, on May 23, 1947, Respondent ABC signed an affiliation contract with WARC. In July 1947, Respondent affiliated with WVET (R. 74-76, 92 and Ex. 27). Thereafter, each separately exercised its privilege of terminating the use of WSAY and notified Petitioner (R. 78, 96, 169, 170; Exs. 19, 28, 29, 30).

The trial court permitted WVET to intervene and denied the request for a preliminary injunction with a memorandum opinion (R. 149-150). The Circuit Court of Appeals concluded that the essential issue in the case was whether

the Respondents had "really acted individually and not jointly" (R. 169). After analyzing the facts relevant to that question, the court below affirmed the denial of the preliminary injunction, concluding that "In the record now before us there is no persuasive evidence of a conspiracy to boycott or otherwise unlawfully exclude the plaintiff from obtaining defendants' programs, whatever may later be established at a trial." (R. 169).

ARGUMENT.

I. The Decision Below Does Not Call for Review by this Court.

The petition misconceives the holding of the Court below. What it ruled on was the following prayer for preliminary injunction in Paragraph IX(c) of the Complaint (R. 22):

> "(b) That, on behalf of plaintiff Federal Broadcasting System, Inc., a temporary restraining order issue forthwith and a preliminary injunction issue immediately thereafter enjoining the carrying out of the agreement and conspiracy entered into by defendants ABC and Mutual for the withdrawal of ABC and Mutual programs from Station WSAY pursuant to the unlawful conspiracy to boycott Station WSAY;"

The issue thereby presented was one of fact whether Respondents ABC and Mutual concertedly boycotted Petitioner's station. As has been noted, the court below held that no finding of concert was warranted on this record and affirmed the trial court's denial of interlocutory relief.

In the present posture of the case, the decision below does not support review here, whatever the ultimate merits of the complaint. The rule is well established that the grant or denial of a preliminary injunction is within the sound discretion of the trial court. *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141; *Rice & Adams Corp.* v. *Lathrop*, 278 U. S. 509, 514. This Court has often denied certiorari at an intermediate stage in cases where, after trial on the

merits, it has later granted the writ and reversed the original position of the trial court. See cases collected at Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, 623, 628. The Court has been guided, among other thing, by recognition of "the proven insufficiencies" of a "procedure based on affidavits and interrogatories" as a means of determining serious issues of fact. (*Eccles* v. *Peoples Bank*, 333 U. S. 426, 434.)

In the circumstances at bar the decision below was a clearly appropriate exercise of the Court's discretion. Petitioner's sole reliance was upon evidence "not subject to probing by judge and opposing counsel" (*Eccles* v. *People's Bank, supra*, 333 U. S. at 434), and Respondents' affidavits were contradictory on the vital issue of concerted action. The denial of interim relief was therefore wholly proper; indeed it was required. See, e.g., *Warner Bros. Pictures* v. *Gittone*, 110 F. (2d) 292, 293 (C. C. A. 3, 1940); *Behre* v. *Anchor Ins. Co.*, 297 Fed. 986, 991 (C. C. A. 2, 1924); *Stanley Co.* v. *Lagomarsino*, 49 F. (2d) 702, 703 (C. C. A. 2, 1931); *Murray Hill Restaurant* v. *Thirteen Twenty One Locust*, 98 F. (2d) 578, 579 (C. C. A. 3, 1938). Moreover, disputable questions of law are also involved in this case (R. 170) which must be resolved before Petitioner can finally prevail. See, e. g., *Lowe* v. *Consol, Edison*, 67 F. Supp. 287, 289 (S. D. N. Y., 1941); *Hand* v. *Mo.-Kan. Pipe Line Co.*, 54 F. Supp. 649, 651 (Del., 1944).

It follows, as the court below held (R. 167), that the denial of interlocutory relief was no abuse of the trial court's discretion.

II. The Court Below Properly Ruled that in the Absence of Concerted Action No Violation of the Antitrust Laws Was Shown.

The lower court was right in holding that since they acted individually, Respondents' conduct was entirely "within their rights" (R. 169). For without the vital element of

concert, as to which the issue was resolved against Petitioner,[2] its charges have no substance.

1. *The price-fixing charge:* Petitioner's contention that the lower court upheld illegal price fixing of WSAY's rates to national advertisers is without foundation. As the lower court perceived, broadcast time for a network program is not bought by a national advertiser from individual stations. It is bought from networks—as part of an "aggregate" of which there are other components besides the time of the individual station (R. 169). For example, among these are the networks' own facilities, including nationwide wire lines which connect the individual stations into a network, artistic and technical services, and simultaneous time which the network has purchased over many other stations. (See FCC Chain Broadcasting Report, 1941, pp. 3-4, 41, 77; Exs. 20, 21).

What petitioner calls price-fixing is the expression by the network of its opinion of what the time of the individual station is worth in terms of the possibility of resale to network customers and the operation and welfare of the network as a whole (R. 61-62, 73, 82-84, 99). Petitioner's chief affiant recognizes that the network "undertakes to sell the facilities of my station to advertisers",[3] but Petitioner

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[2] It is axiomatic that the resolution below of contradictory evidence or inferences will not be disturbed on appeal. *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 41; *Gary Theatre Company* v. *Columbia Pictures Corporation*, 120 F. (2d) 891, 894-5 (C. C. A. 7, 1941).

[3] R. 38. The superficially conflicting passage quoted from the FCC's Chain Broadcasting Report (Pet. p. 6) is out of context. What the quotation referred to was the sale to the national advertiser of spot broadcast time, not network broadcast time. (Report pp. 73-75). It is also sharply apparent from the following rule which the FCC "accordingly adopted" (*National Broadcasting Co.* v. *United States*, 319 U. S. 190, 209):

> "No license shall be granted to a standard broadcast station having any contract, arrangement or understanding, expressed or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time *for other than the network's programs.*" (Emphasis supplied.)

urges the proposition that under the antitrust laws, it alone is entitled to decide for the networks what prices they shall charge their own customers (R. 38). The novelty of this proposition is enhanced by the facts that Petitioner's facilities are but a single constituent of the product sold by the networks and the market for it is one which the networks have created.

The implications of oppression of WSAY by Respondents are no less curious. There is no suggestion that Respondents discriminated against Petitioner by offering it less favorable terms than other comparable facilities brought. Nor was there any incentive for the networks to depreciate the prices for WSAY. By the contract which each Respondent repeatedly offered Petitioner (Exs. 20-21, R. 42-43, 72, 91-92), the more the network could charge its customers for WSAY, the greater would be the network's profit. Petitioner's real objection therefore must be that Respondents refused to buy its product at higher prices than the market would bear (R. 61, 67, 72, 81-84, 98-99, 123).

2. *The charge of exclusion:* There was no ruling by the lower court, either express or implied as claimed by Petitioner, that the networks have the "right to exclude unaffiliated stations from all access to the national advertising market". In fact, the asserted exclusion from "all access to the national advertising market" is imaginary. Petitioner is completely free to offer its facilities and programs to national advertisers (R. 98). What it is unable to do, as a non-affiliate, is to supply the demand for network service, produced by someone else with whom it was unable to arrive at a bargain. Petitioner's actual complaint is simply that because the affiliation terms it demanded were unacceptable, other affiliates were chosen by Respondents to carry their programs in Rochester. There was nothing unlawful about that. As the opinion below recites (R. 169):

> "A network is not a common carrier and each therefore had the right in the absence of concerted action

to make such contracts for the distribution of its programs as it chose."

The lower court was clearly right. So long as the choice is individually made, the right of a trader to select those with whom he will deal is left unimpaired by the Sherman Act. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307; *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U.S. 565, 572-3; *Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Co.*, 227 Fed. 46, 48-49 (CCA 2d, 1915); *Brosious* v. *Pepsi-Cola Co.*, 155 F. (2d) 99, 101-2 (CCA 3d, 1945); *Johnson* v. *J. H. Yost Lumber Co.*, 117 F. (2d) 53, 61-62 (CCA 8th, 1941). No different rule applies in the broadcasting field. See *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. (2d) 597, 600 *et seq.*, (CCA 3rd, 1945). The principle is reinforced by the specific declaration in the Communications Act of 1934, that "a person engaged in radio broadcasting shall not be deemed a common carrier." (48 Stat. 1065, 47 U.S.C. § 153). Moreover, it is backed by particularly cogent considerations of public policy in the case of the networks. For in view of the inherently limited number of broadcasting facilities, any requirement that the networks extend their wire lines to all comers would inevitably lead to "wasteful duplication of service" (FCC Chain Broadcasting Report, 1941, p. 58). This doubtless prompted the FCC's express recognition of a network's right to grant "first call" on its programs to affiliates (R. 111).[4]

The truth is that Petitioner's lack of an affiliation, and any consequent financial injury, is the result not of any

[4] The fact is, moreover, that on this record there is no ground for the allegation that the networks have in fact "excluded" unaffiliated stations from network programs. Before acquiring their own regular affiliates, both Respondents employed WSAY'S facilities on a non-affiliated basis. (Ex. 19, pp. 1-3; R. 80, 93). Petitioner's own affidavits reveal instances in which WSAY was retained by NBC and CBS to carry programs rejected by their regular affiliates. (R. 34-36). What Respondents will do in the future with programs rejected by their newly affiliated stations in Rochester is in the realm of speculation on this record.

illegal exclusionary conduct by Respondents, but of the FCC's action in licensing two more stations in Rochester. These raised the total number in the city to five—one more than there were national networks. Petitioner was thereby put in the unwelcome position of having to compete for the business of Respondents' networks. It lost out for the simple reason that it priced WSAY out of the market for the time being.[5]

3. *The asserted misconstruction of the Chain Broadcasting Regulations:* There is no merit in Petitioner's third specification of error to the effect that the lower court erroneously held that the Chain Broadcasting Regulations permit "price-fixing and exclusive practices of the national chain networks". This specification is meaningful only on the premise that illegal price-fixing or exclusionary conduct had been proved. But as has been shown, that would require proof of concert, on which the issue was resolved against Petitioner. The necessary result was that the court properly rejected the price-fixing charges since all that remained was a claim that the individual networks were entitled to no voice in the prices for the "aggregate" product they were selling to their own customers (R. 169). With specific reference to "exclusion", all that the court held was that, on the record at hand, it was too doubtful of the merits of Petitioner's charges to order the drastic relief prayed (R. 170). That these doubts were well founded is evident from the preceding discussion.

The petition does not support its unwarranted implication that Respondents violated the Chain Broadcasting

[5] Under Rule 3.103 of the Chain Broadcasting Regulations, affiliation contracts are limited to a maximum duration of two years. (R. 112.) There is no factual support for the conclusionary statement in Petitioner's affidavits that net work affiliations "almost always continue on . . . a permanent basis" (R. 46). This regulation in fact inhances the competitive opportunities which Petitioner could claim under the antitrust laws by guaranteeing that affiliations with each network will be on the market not less than once every two years.

Regulations. There is no citation of any offending provisions of the affiliation contracts used by Respondent (Exs. 20 and 21), for the simple reason that there are none. Nor is there any showing of conduct inconsistent with those Regulations.[6]

4. *The conspiracy alleged to arise from similarity of conduct:* By Petitioner's last specification of error, the lower court is charged with an improper refusal to recognize a "prima facie conspiracy" allegedly arising from a uniform system of business "completely" excluding unaffiliated stations from the national advertising market (Pet. pp. 5, 9). This specification is another unsubstantial effort to challenge the court's determination of fact that there was no sufficient showing of concerted exclusion to support the relief sought (R. 170).

The proof relied upon to show the alleged common participation of the four networks in an improperly "uniform course of dealing" is nothing more than the use of a business method which Petitioner admits "is infinitely more convenient to the networks" than the one Petitioner would prefer them to follow (R. 38-39). In other words, the argument presupposes the unique proposition that the antitrust laws preclude the adoption of a superior commercial practice if it is in prior use by competitive enterprises. Much more than such similarity of business practice as petitioner relies upon here is essential to establish even a prima facie case of a violation of the Sherman Act. Compare *Interstate Circuit Inc.* v. *United States,* 306 U.S. 208; *American Tobacco Co.* v. *United States,* 147 F. (2d) 93 (CCA 6th, 1944), affirmed 328 U.S. 781.

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[6] The quotation from page 59 of the Chain Broadcasting Regulations (Pt. p. 7) is also out of context. The full text is plain that the FCC left to negotiations between the interested parties the determination of the extent to which programs rejected by affiliates would be broadcast elsewhere. Affiliates were simply prohibited from precluding such negotiations, and Respondents' affiliation contracts do not prevent such negotiations. (Exs. 20 and 21.)

Moreover, the argument incorrectly assumes that there was any improper exclusion of Petitioner or anyone else. The facts are precisely opposite. They show with respect to WSAY that Respondents here were not only willing, but consistently endeavored, to do business with Petitioner on a non-discriminatory basis, only to be met by Petitioner's insistence on preferential treatment.[7] They were not thereby prohibited from contracting with other affiliates when they became available. Nor were they thereafter under any obligation to do business with Petitioner. For, as has been previously established, not only are the networks entitled to the right of the private trader to determine with whom he will deal and when, but considerations of public policy, as reflected both in the FCC's expressions and regulations, support the practice of the networks to maintain only one regular affiliate in any given locality (See pp. 7-8, *supra*).

CONCLUSION.

Petitioner's basic thesis is that in buying broadcast time the networks must, as a matter of law, submit to the dictates of the sellers as to the price to be paid for such time. This would preclude any possibility of the operation of a network as a cohesive unit by committing the determination of vital matters of business judgment and policy to hundreds of widely separated individuals concerned primarily with the welfare of their isolated enterprises. An end would thus be put to the networks as independent going concerns. There is no precedent in antitrust law which supports Petitioner's theory. Even when so dominant a position has been achieved that all comers must be served, the obligation is only to serve all alike, not to serve them on their own terms.

For the foregoing reasons, the petition not only requires denial because of the nature of the order in question and

[7] This alone distinguishes the *Goldman* and *Bigelow* cases cited at page 9 of the petition.

the record on which it was issued, but also because there is no showing either of a conflict among circuits or of any question of federal law calling for settlement by this court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 140

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner,

v.

AMERICAN BROADCASTING CO., INC., and
MUTUAL BROADCASTING SYSTEM,
Respondents.

BRIEF ON BEHALF OF MUTUAL BROADCASTING SYSTEM, INC., RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1948

No. 140

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner,

v.

AMERICAN BROADCASTING CO., INC., and
MUTUAL BROADCASTING SYSTEM,
Respondents.

BRIEF ON BEHALF OF MUTUAL BROADCASTING SYSTEM, INC., RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks the issuance of a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on April 8, 1948 (R. 167-171; 167 F. 2d 349 (C. C. A. 2d, 1948)), which unanimously affirmed an order of the District Court of the United States for the Southern District of New York, entered on November 12, 1947, denying petitioner's motion for preliminary injunction (R. 149, 150).

Facts

Nature of the Action.

Plaintiffs, Gordon P. Brown and Federal Broadcasting System, Inc. (petitioner), are the former and present owners, respectively, of radio broadcasting station WSAY located in Rochester, N. Y. (R. 3). Defendants are the four major radio networks, namely, National Broadcasting Company,* Columbia Broadcasting System, Inc.,** American Broadcasting Company, Inc.,† Mutual Broadcasting System, Inc.,‡ and one officer of each of the latter two networks (R. 4, 5). Only Mutual and ABC are parties to the motion here involved (R. 24-27).

This action is brought under Sections 4 and 16 of the Clayton Act (15 U. S. C., §§ 15, 26) and Section 313 of the Federal Communications Act of 1934 (47 U. S. C., § 313) for alleged violations by defendants of Sections 1 and 2 of the Sherman Anti-Trust Act (15 U. S. C., §§ 1, 2) (R. 4). Plaintiffs seek the issuance of permanent injunction, treble damages, and the revocation by court decree of the radio station licenses issued by the Federal Communications Commission to ABC, NBC and CBS (R. 22, 23).

The Complaint.

The complaint charges that the four major radio networks are engaged in a general conspiracy in restraint of trade (R. 18). Stripped of all verbal embellishment, plaintiffs allege that this network conspiracy, operating through affiliation contracts with local stations, has sought, acquired and exercised the power to fix prices and to exclude broadcasting stations not affiliated with the networks from

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* Hereinafter referred to as NBC.

** Hereinafter referred to as CBS.

† Hereinafter referred to as ABC.

‡ Hereinafter referred to as Mutual.

all access to the national radio advertising market (R. 18, 19). It is also alleged that Mutual and ABC have conspired to boycott the petitioner (R. 19, 20).

Mutual filed a verified answer to the complaint. The answer denies all allegations of conspiracy, price-fixing and boycott and any other violation of the Anti-Trust Laws (R. 84-88).

The Motion for Preliminary Injunction.

On the same day that the complaint was served, petitioner moved for a temporary injunction (R. 24-27). Only the respondents herein, ABC and Mutual, were made parties to the motion. At the time that this motion was heard by the District Court the time for the filing of answer by the defendants had not yet expired and as a result the only answer before the court was that of Mutual.

By its motion petitioner sought a mandatory injunction *pendente lite* requiring the two respondents to furnish Radio Station WSAY with their network programs. The record indisputably demonstrated and petitioner conceded that Mutual was not under any contractual obligation to furnish network program service to WSAY (R. 78, 45).

In support of its motion, petitioner filed voluminous affidavits containing, for the most part, only conclusory averments unsupported by factual data (R. 30-59). Respondents filed answering affidavits (R. 59-84, 89-148). The opposing affidavits raise critical disputes as to the facts which are basic to plaintiffs' cause of action. However, the following undisputed facts, which are not alluded to in the petition, emerge from these affidavits:

From 1936 until 1947, there were three full time radio stations in Rochester, namely, WSAY, WHAM and WHEC. Until the promulgation of the Federal Communications Commission's Chain Broadcasting Regulations in 1941, WHAM and WHEC were the exclusive affiliates of the National Broadcasting Company and the Columbia Broadcasting System respectively (R. 73, 91).

In 1940, WSAY entered into an affiliation agreement with Mutual. Under this agreement WSAY became the outlet for the broadcasting of Mutual network programs in the Rochester area. This contract was renewed until 1943, when it expired (R. 70, 79). In the interim, the Chain Broadcasting Regulations, promulgated in 1941, had effected the severance of the American Broadcasting Company from the National Broadcasting Company. Thus, in 1943, a situation existed in Rochester wherein two major radio networks had no affiliated stations in Rochester and WSAY had a monopoly over the only available unaffiliated full time outlet (R. 73, 91).

Shortly after the expiration of the affiliation agreement between Mutual and WSAY, Mutual offered that station a new affiliation contract. WSAY refused to enter into any such agreement, frequently reiterating that network affiliation and income were of no advantage (R. 80). Periodic negotiations were subsequently had between Mutual and WSAY with the view toward executing an affiliation agreement. During these negotiations WSAY rejected the offer of an affiliation arrangement, stating that it was that station's intention to sell its local facilities directly to national advertisers, thus rendering the network's facilities unnecessary (R. 80, 81).

Despite WSAY's refusal to enter into an affiliation arrangement Mutual continued its relations with WSAY, contracting with WSAY on an individual basis for each network program for which Rochester coverage was desired (R. 80).

In 1945, WSAY, without giving the usual notice required in the broadcasting trade, increased its hourly broadcasting rate from $160 per hour to $280 per hour. The ostensible occasion for the rate increase was an increase in WSAY's power from 250 to 1,000 watts. In addition, WSAY reserved the right to recapture or cancel broadcasting time committed to Mutual's advertisers on short notice (R. 71, 81, 82).

The increase in price was entirely out of proportion to the increase in coverage (R. 71, 81, 82). The rate of station WHEC, the CBS affiliate in Rochester, was $175 for its 5,000-watt facilities as compared with the $280 demanded by WSAY for its 1,000-watt facilities (R. 72). Moreover, station WSAY had the lowest measured audience rating of all of the Rochester stations (R. 83, 84).

Mutual immediately received numerous protests from its advertisers who properly claimed that the size of the increase was unwarranted and arbitrarily imposed without adequate notice (R. 71, 82, 83; see exhibit annexed to affidavit of Z. C. Barnes, R. 83, 84). This disproportionate price increase not only placed Mutual in a serious competitive disadvantage in regard to the other networks but gave WSAY preferential treatment in that it received a larger share of each national advertising dollar than was received by any comparable Mutual affiliate (R. 71, 72).

After this time Mutual frequently offered WSAY an affiliation contract, requesting only that a competitive price be agreed upon and that WSAY modify its policy of demanding the right of recapturing committed time on short notice. Time after time WSAY refused to sign any such affiliation contract (R. 72, 73, 79, 80). Since both Mutual and ABC required outlets in Rochester, WSAY, by keeping itself aloof from network affiliation, enjoyed the enviable position of being able to play the two networks against each other and to subject them and their advertisers to an extortionate price (R. 93, 99).

However, between 1943 and 1946 a threat to WSAY's monopolistic position in Rochester began developing. In 1943 a new station, WARC, applied to the Federal Communications Commission * for a license to operate in Rochester. To forestall this competitive threat WSAY immediately filed an application for a license to broadcast in a nearby locality. Because of technical limitations on available wave lengths, the granting of WSAY's application would have

* Hereinafter referred to as FCC.

automatically precluded the licensing of WARC (R. 94). At that time WSAY offered to enter into an affiliation agreement with ABC in return for cooperation by ABC in aiding WSAY to secure the new license (R. 94, 95). The affidavits below show that when this offer was made, WSAY notified ABC of its intention to discontinue carrying Mutual programs and to cancel all Mutual programs upon the expiration of contractual commitments (R. 105-107, 109). Petitioner's application was denied by the FCC.

In 1946 a group of 37 veterans organized the Veterans Broadcasting Company and applied for a license to operate in Rochester (R. 160). The Federal Communications Commission granted licenses to WARC on May 1, 1947 and WVET, the veterans' station, on June 2, 1947 (R. 92). Thus, two new affiliates became available as Rochester outlets for national radio network programs. Despite this, Mutual again offered WSAY a regular Mutual affiliation agreement, which was again refused. WSAY notified Mutual of its intention of purchasing a direct line from The New York Telephone Company to the WSAY control room, thus obviating the need for Mutual's transmission facilities (R. 74, 75; Exs. 24-27 annexed to affidavit of Gordon P. Brown).*

While negotiations with WSAY were under way Mutual also communicated with the two new Rochester stations as to the possibility of one of them becoming a Mutual affiliate (R. 74). After negotiations with both stations, Mutual entered into an affiliation agreement with WVET (R. 76, 77). The price negotiated between Mutual and WVET was $175 per hour for its 5000 watt station, a price in sharp contrast to the $280 per hour demanded and previously obtained by station WSAY for its 1000 watt coverage (R. 76).

Pending the construction and operation of WVET, Mutual continued to provide WSAY with programs. These programs were provided on an individual commitment basis

* The exhibits attached to the affidavit of Gordon P. Brown are not printed in the Record but have been filed by petitioner with this Court.

under an arrangement which, plaintiffs concede, was cancellable at will (R. 45, 78). In early October, 1947, it was estimated that WVET would be ready to commence operations about November 10, 1947. Therefore, by letter dated October 11, 1947 Mutual, although concededly no notice of cancellation was required (R. 45), notified WSAY by registered mail of its intention to cancel its existing relationships with WSAY, effective November 10, 1947 (Ex. 30 annexed to affidavit of Gordon P. Brown). Delays in the completion of station WVET made Mutual's predictions some ten days premature. As soon as Mutual learned of this delay, it immediately offered to continue furnishing WSAY with programs until WVET was ready to commence operations. WSAY accepted this offer (R. 45, 78).

On November 12, 1947, Mutual notified WSAY of the cancellation of its existing program commitments effective November 19, 1947. On November 22, 1947, WVET commenced operations, and since that date has broadcast the programs of the Mutual network.

On the basis of these undisputed facts and the conflicting assertions contained in the record before it, the District Court, after full argument by all parties, including WVET which was granted leave to intervene (R. 155-164, 149), denied the motion for preliminary injunction (R. 149, 150).

Petitioner filed notice of appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 150). Immediately thereafter petitioner moved before Judge Coxe, who had heard the original motion, for a stay pending appeal. The motion was denied. A similar motion was made to the Circuit Court, which, after argument before a full bench (Judges Learned Hand, Augustus Hand and Jerome Frank), was denied. On appeal to the Second Circuit the order denying preliminary injunction was unanimously affirmed (Judges Learned Hand, Augustus Hand and Swan) in an opinion by Augustus Hand, J. (R. 167-171; 167 F. (2d) 349 (C. C. A. 2d, 1948)). Petitioner now seeks review by this Court of this judgment of the Circuit Court.

The Decision of the Circuit Court

Petitioner seeks certiorari on the ground that the decision of the Circuit Court announces certain basic principles of anti-trust law which should be reviewed by this Court. The petition urges as ground for the issuance of the writ that the Circuit Court of Appeals erred in holding: (1) that the networks have the right to fix the price that local stations may charge national advertisers for broadcasts; (2) that the networks have the right to exclude unaffiliated stations from all access to the national advertising market; (3) that the FCC's Chain Broadcasting Regulations sanctioned price fixing and exclusive practices; and (4) that a uniform course of dealing by the networks which excludes unaffiliated stations from the national advertising market does not constitute a prima facie conspiracy in violation of the Sherman Act (Petition, pp. 4, 5). None of these legal principles was decided by the Court below.

The Circuit Court merely held that the District Judge had not abused his discretion in denying preliminary injunction. At the outset of his opinion, Judge Augustus Hand stated:

> "This is an appeal by the plaintiff from an order denying a motion for a preliminary injunction. Such orders are largely within the discretion of the judge hearing the motion and we have no reason to suppose that he abused his discretion in the present case" (R. 167, fol. 168).

In reaching this determination, the Circuit Court applied the well established principle that a preliminary injunction will not issue where the right to such relief is not clear. Finding the factual matter in the record insufficient to support petitioner's allegations of conspiracy, boycott and price fixing, the Court stated:

> "In the record now before us there is no persuasive evidence of a conspiracy to boycott or otherwise unlaw-

fully exclude the plaintiff from obtaining defendants' programs, whatever may later be established at a trial" (R. 169, fol. 170).

On the motion, petitioner claimed that respondents had violated the Sherman Act because: (1) the affiliation agreements of the four major networks with their local stations contained substantially uniform provisions; (2) the respondents, Mutual and ABC, cancelled their existing relationships with WSAY at approximately the same time; (3) the networks fixed the price for which they sold their facilities to national advertisers; (4) the affiliation agreements contained provisions which were "exclusive" in nature. The Court below carefully reviewed the factual basis submitted by petitioner for these claims and found that the proof was too unpersuasive and conflicting to warrant the granting of injunctive relief prior to the trial.

The So-Called "Uniform Course of Dealing".

Petitioner's allegations of unlawful conspiracy among the networks are largely predicated on the alleged uniformity of the affiliation agreements of the various networks and the business dealings thereunder.

The record before the Circuit Court shows certain basic differences between the affiliation agreements of the various networks. The record further demonstrates that such similarities as exist are the necessary product of an industry whose very nature presents certain problems and dictates certain practices common to all who engaged in it and of the necessity of such agreements complying with the Chain Broadcasting Regulations of the Federal Communications Commission, which are largely determinative of their contents.

The Court below, referring to this contention of petitioner, stated:

"The further claim that certain business practices of the networks and terms of the affiliation agreements

> required by them as a condition for furnishing programs showed a conspiracy because of a general uniformity in form and practice is also unpersuasive. We cannot say that such similarity results from anything more than common business solutions to identical problems in a competitive industry, and the forms used may well merely indicate similar business practices or formulations such as we find in insurance policies, bills of lading, warehouse receipts and other commercial documents. Moreover, the similarity of many of the terms in these contracts might be explained by requirements of the Federal Communications Commission governing the stations" (R. 170, fols. 171, 172).

No general or novel principles of anti-trust law are involved in this determination.

The So-Called "Boycott".

As illustrative of the claim that respondents were attempting to jointly boycott the petitioner, petitioner has pointed to the fact that WSAY received notices of cancellation by Mutual and American Broadcasting Systems of programs furnished WSAY at approximately the same time.

In view of the record before the Circuit Court which indisputably showed that the cancellation notices by the two networks were the result of a competitive race by these networks to have their respective new affiliates be the first new station to operate in the Rochester area and that the cancellations were concededly given pursuant to contractual right (R. 92-96; Ex. 30 annexed to affidavit of Gordon P. Brown), Judge Hand stated:

> "* * * The simultaneous aspect of their notices is an insufficient basis for the charge of concerted action when it is remembered that American and Mutual were both in a position where time was of the essence in their competition with each other to put into operation as soon as possible their new affiliation contracts with WVET and WARC" (R. 170, fol. 171).

Again, no broad principle of anti-trust law was involved.

The So-Called "Price Fixing".

Petitioner's allegations of price fixing are based on the unusual premise that it is unlawful, *per se*, for a network to have a voice in the price to be paid by national advertisers for the use of its facilities.

The affidavits of petitioner and respondent agree that advertisers purchase three types of radio time. First, the local or national advertisers can purchase program time on a single local station. This is known as local time. Second, both local and national advertisers can purchase time on a single local station for a short announcement immediately preceding or following a regular program. This is known as "spot" time. Third, advertisers can purchase time over the whole or a portion of a national network for the broadcast of a network program. This is known as national network time (R. 8, 62).

Petitioner has not contended that respondents have any voice in fixing the price to be charged advertisers for local time or spot time. The sale of such time involves only the facilities of the local station in which the network has no interest. The purchase of national network time, however, involves the purchase of the aggregate facilities of the stations comprising the network and the facilities of the network itself, including transmission facilities, sales facilities, promotion facilities, etc. Not only the local stations but the networks have a direct interest in the price to be charged for these aggregate facilities (R. 62, 66, 72, 73, 82).

In view of the facts set forth in the record, the Court below held that petitioner did not have the right, *per se*, to use not only its own facilities but those of the network and still be the sole determiner of the price to be charged for these joint facilities. Judge Hand stated:

> "* * * Plaintiff had no inherent right to set its own rate to an advertiser and in all other respects to use the facilities of the radio network, nor does the court have power to compel defendants to deal with the

plaintiff on such terms. Plaintiff misconceives the function of a network, which buys time from the stations and sells to the advertisers its facilities and the services of those stations as an aggregate. Not only are the networks not common carriers, but it would be cumbersome if not impractical for them to furnish programs if they did not have authority to deal independently with the advertising concerns instead of leaving the rates to be determined individually by the different stations which they serve. Such control by a network, operating as a single coordinating agency, would seem to be at least desirable in order that it might compete with other networks and advertising media and to assure a more reasonable distribution to every station of the income which the network as a whole may receive. We do not say that it would be impossible for a network to allow each station to set its own rate, but it would seem a less practical course of business and certainly one to which plaintiff can make no claim as of right" (R. 169, fols. 170, 171).

The So-Called "Exclusive" Affiliation Agreements.

Petitioner's final claim is that the network affiliation agreements violate the Sherman Act because they create a mutually "exclusive" relationship between a single network and a single station in a given territorial area.

On the motion, the Court below had before it the various affiliation agreements of the four networks. Respondent demonstrated, without contradiction by petitioner, that its affiliation agreements complied in all respects with the Chain Broadcasting Regulations of the FCC (R. 62-65). These regulations prescribe in detail the terms under which a local station can permissibly contract with a national network.

The record is clear that an affiliated local station does not obtain territorial exclusivity over the programs of a network. The affiliation agreements, on their face, merely grant to the local stations the right of "first call" on network programs (Ex. 20 annexed to affidavit of Gordon P. Brown). The network has the right to make available any

program rejected by its affiliate to any other station in the same territorial area. The right of first call is specifically authorized by a Regulation of the FCC (FCC Regulation 3.102) and no contention has been made that Mutual's affiliation agreements in any way violate this regulation.

In view of these clear facts in the record, the Court stated:

> "We think it improper to grant a preliminary injunction upon the charge that the networks have unlawful 'exclusive' contracts with their stations where the Federal Communications Commission, after protracted hearings and consideration not only of the general public interest but of the Sherman Anti-Trust Act, has specifically sanctioned many of the important terms of the affiliation contracts at present in use and the defendants have given reasonable grounds for denying their exclusiveness or illegality. See F. C. C. Report on Chain Broadcasting, Comm. Order No. 37, Docket No. 5061, May, 1941, p. 46; *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 223" (R. 170, fol. 172).

Not only did the Court below find that the petitioner had failed to show a clear right to the injunctive relief sought but it also found that the granting of such relief would impose a new status on the parties rather than maintain the *status quo* and would inflict substantial injury on the respondents and on WVET and WARC. It therefore stated:

> "We cannot see any reason for requiring the defendants to maintain existing arrangements for providing programs for plaintiff when by the very terms of those agreements they might be cancelled and when a failure to recognize the cancellations as valid might jeopardize the new affiliation contracts made by these defendants with WVET and WARC" (R. 170, 171, fol. 172).

Questions Sought to be Reviewed

The foregoing discussion and a reading of the Circuit Court's opinion demonstrate that the legal principles of which petitioner seeks review were neither in issue nor decided by the Court below.

The sole question which could be reviewed by this Court is whether the District Court and the Circuit Court have both abused their discretion in denying preliminary injunction where:

(a) no clear right to the relief sought has been shown;

(b) the granting of relief would not merely maintain the *status quo* but would impose a new legal obligation on the parties; and

(c) the granting of the relief would inflict on the respondents and third parties greater injury than would be inflicted on petitioner if relief were denied.

POINT I

Certiorari will not be granted to review the exercise of discretion in the making of an interlocutory order where no special circumstances exist requiring review prior to final judgment.

A. Certiorari will be issued to review an interlocutory order only when necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause; no special circumstances requiring interlocutory review exist in this case.

This Court has frequently reiterated that the issuance of writ of certiorari is limited to cases of particular gravity and public importance. *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163 (1922); *Layne & Bowler Corp.* v.

Western Well Works 261 U. S. 387, 393 (1922); *Field* v. *United States,* 205 U. S. 292, 296 (1906); *Matter of Woods,* 143 U. S. 202 (1891). Where the judgment sought to be reviewed is an interlocutory one, not only must it be shown that the judgment presents issues of grave public concern but it must also be shown that special circumstances exist which require review prior to final judgment. *Meccano, Ltd.* v. *Wanamaker,* 253 U. S. 136, 140-142 (1919); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U. S. 251, 258 (1915); *United States* v. *Beatty,* 232 U. S. 463, 467, 468 (1913); *Forsyth* v. *Hammond,* 166 U. S. 506, 513-515 (1896); *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co.,* 148 U. S. 372 (1892).

In *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co., supra,* Justice Grey stated at page 384:

> "• • • Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

Similarly, in the *Hamilton-Brown Shoe Co.* case, *supra,* Justice Pitney held that the fact that the order sought to be reviewed was an interlocutory one "itself alone furnished sufficient ground for the denial of the application". See also *John Simmons Co.* v. *Grier Bros. Co.,* 258 U. S. 82, 91 (1921).

There are no special circumstances in this case which require review prior to final judgment. The order sought to be reviewed will be incorporated in the final judgment of the lower court and the fact that certiorari is now

denied will in no way effect the issuance of certiorari by this Court to review the final judgment. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 398, 418 (1922). On the other hand, the granting of certiorari at this preliminary stage of the proceedings would involve a piecemeal handling of appeals. The impropriety of such a procedure has often been expressed by this Court. See, e.g., *Heike* v. *United States*, 217 U. S. 423, 428, 429 (1909).

Anti-trust cases are, by their nature, complicated. They almost invariably involve multiple factual issues and often present questions basic to our entire economy. See, e.g., *United States* v. *Aluminum Co. of America*, 44 F. Supp. 97 (S. D. N. Y., 1941). On the basis of a few affidavits, petitioner has sought to overrule the holding of this Court that radio networks are not common carriers (*F. C. C. v. Sanders*, 309 U. S. 470, 474 (1939)), with the exception that, under petitioner's thesis, instead of a commission fixing the rates to be charged for network service, petitioner would, without negotiation, fix respondent's charges. To attempt to adjudicate broad principles of anti-trust law on the basis of the generalizations contained in petitioner's affidavits and without the benefit of the probing factual determinations of a trial would be improper. Neither the interests of the petitioner, the respondent nor the public require this Court to deal with factual abstractions.

The inappropriateness of review at this time is emphasized by the fact that although petitioner's allegations of conspiracy and price fixing are directed against the four major network-defendants, only two of these defendants are parties to the motion for preliminary injunction. The National Broadcasting Company and the Columbia Broadcasting System were not heard on the motion and, in fact, their answers to petitioner's complaint had not been served by the time of the hearing before the District Court. It is difficult to conceive how this Court could properly review the broad questions of conspiracy involved where

two of the major parties alleged to be part of the conspiracy have not as yet had an opportunity to be heard or even to file affidavits in opposition to petitioner's contentions.

Petitioner argues as ground for review at this time that under the decision of the Circuit Court, even if it could produce additional evidence of conspiracy at trial, it would still be denied relief. There is nothing in the decision of the Court below to sustain this contention. The opinion of the Circuit Court leaves the door open to petitioner to produce at the trial any relevant evidence which it has in support of its allegations. What petitioner is perhaps attempting to state is that trial would be futile because it has no evidence to produce beyond that contained in its affidavits. If this is the case, it does not militate against the exercise of discretion by the Court below. It may, however, indicate that petitioner has no case.

B. It is not the function of certiorari to bring up for review interlocutory orders involving only questions of discretion.

The sole question before the Circuit Court, as in the case of any appeal from the denial of preliminary injunction, was whether or not the District Judge had abused or improvidently exercised his discretion in denying preliminary injunction. *Rogers* v. *Hill,* 289 U. S. 582, 586, 587 (1932); *Alabama* v. *United States,* 279 U. S. 229, 230, 231 (1928); *Meccano, Ltd.* v. *Wanamaker, supra.* It is not the office of the writ of certiorari to bring up for review interlocutory orders involving only the exercise of discretion.

In *Robertson and Kirkham,* Jurisdiction of the Supreme Court of the United States (1936 Ed.), the authors state at pages 627, 628:

> "Where the question presented on petition for certiorari is whether interlocutory injunction should or should not have been granted, it is necessary to give

consideration to another rule. It is well settled that an application for interlocutory injunction is addressed to the sound discretion of the trial court, and that, on appeal from an order granting or denying such relief, the duty of the appellate court, at least generally, is not to decide the merits of the case but simply to determine whether the discretion of the trial court has been abused. This rule, as well as the rule respecting reluctance to review non-final decrees and judgments generally [see Subpoint A, *supra*], is a consideration affecting the exercise of the Supreme Court's certiorari jurisdiction."

This principle was applied by this Court in the case of *Wilshire Oil Co.* v. *United States,* 295 U. S. 100 (1934). In that case the District Court granted preliminary injunction. The Circuit Court affirmed. An attempt was made to have certain constitutional questions, purportedly raised in the District Court, certified to this Court. In a *per curiam* opinion the Court stated, at pages 102 and 103:

"This Court is of the opinion that * * * the question before the Court of Appeals upon the appeal from the interlocutory order is whether the District Court abused its discretion in granting an interlocutory injunction; that the Court of Appeals is not bound to decide, upon the allegations of the bill, an important constitutional question, as to which the Court of Appeals is in doubt, in advance of an appropriate determination by the District Court of the facts of the case to which the challenged statute is sought to be applied.

"Nor should this Court undertake to determine the constitutional validity of the statute upon such questions as those which have been certified. If this Court were to deal with the case in its present stage, it would be necessary to order up the entire record, so that the allegations of the bill, and the case as presented to the District Court, could be properly considered. That course would merely bring before this Court the interlocutory order and would result in unnecessary delay in the final determination of the cause. The certificate is therefore dismissed."

The decision of the Court below rests primarily on the proposition that the petitioner has made insufficient factual showing to warrant the granting of the extraordinary relief sought (see pp. 8-13, *supra*). Certiorari will not be issued by this Court to review evidence or to re-examine inferences to be drawn from the facts in the record. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1937); *F. T. C.* v. *American Tobacco Co.*, 274 U. S. 543 (1926); *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440 (1917). Nor can the writ be used merely to provide a party defeated below with another hearing. *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163 (1922).

Petitioner's attempt to read broad principles of anti-trust law into the decision of the Circuit Court does not withstand scrutiny. The legal principles sought to be reviewed were neither in issue before nor decided by the Circuit Court. Moreover, there is nothing in the opinion below in any way inconsistent with decisions of this Court relating to the relationship of the Anti-Trust Laws to radio broadcasting.

Petitioner contends that the Circuit Court's holding that petitioner had failed to establish a clear right to unilaterally determine the rate to be charged for network programs involves the announcement of a legal principle inconsistent with the language of this Court in *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 209 (1941). In support of this contention, petitioner quotes from a portion of that opinion. The quotation is inaccurate and incomplete. For the purposes of accuracy it is set forth in full herein. The question before this Court was the validity of the Chain Broadcasting Regulations of the FCC. In discussing the regulation governing price fixing, Justice Frankfurter stated at page 209:

> "The Commission concluded that 'it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business.

> We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers' (Report, p. 75). [Accordingly, the Commission adopted Regulation 3.108, which provides as follows: 'No license shall be granted to a standard broadcasting station having any contract, arrangement or understanding, expressed or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time *for other than the network's program.*']" (Portion in brackets omitted in petitioner's brief. Italics supplied.)

This regulation prohibits a network from having any voice in the determination of the rate to be charged advertisers for the facilities of the local stations alone. This case does not involve any contention that the networks have fixed prices where only the sale of the facilities of a local station were involved. However, the regulation specifically excludes from the prohibition the sale of network programs and, in effect, authorizes negotiation of the network program prices between the network and the stations. There is, thus, nothing in the opinion below which in any way conflicts or contravenes the holding of this Court or the regulations of the FCC in regard to the fixing of network program prices.

Petitioner also contends that the holding of the Court below that petitioner had failed to produce sufficient factual evidence to support its allegations of conspiracy involves a legal principle in contravention of the policy of the FCC. It is argued that the decision below sanctions territorial exclusivity. This contention is untenable.

Prior to the promulgation of the Chain Broadcasting Regulations in 1941, some of the networks entered into affiliation contracts with local stations whereby the local stations obtained territorial exclusivity over all the networks' programs. After an exhaustive survey, the Federal Communications Commission determined that these exclusive ar-

rangements were not desirable since if any given program was rejected by the local station, no other local station could carry it and the public in the area would thereby be deprived of the program. The Commission also determined that it was undesirable and wasteful for two stations in the area to duplicate the same program. See *National Broadcasting Co.* v. *United States, supra,* at pp. 200, 201. It, therefore, promulgated a regulation providing, in effect, that a local station could contract with a network for "first call" on all the networks' programs but requiring that if the local station did not accept the program the network must be free to offer the program to any other station in the area. This Regulation, No. 3.102, reads as follows:

> "• • • No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. *This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.*" (Italics supplied.)

The affiliation contract of Mutual, which was before the Court below, is in explicit compliance with this Regulation and petitioner has never contended to the contrary. No legal principle is announced by the Court below in any way inconsistent with the policy of the Federal Communications Commission expressed therein.

Contrary to petitioner's claim, the opinion of the Court below does not decide that the FCC Regulations sanction or provide immunity against prosecutions for violations of the Anti-Trust Laws. The Court merely held that where, on the one hand, an inadequate showing of conspiracy had

been made by the petitioner and where, on the other hand, an undisputed showing had been made by each respondent that its affiliation agreements in all respects complied with the validated regulations of the Federal Communications Commission, the Court, on application for preliminary injunction, could not adjudicate that the contracts, *per se*, violated the Anti-Trust Laws (Opinion 170, fol. 172; see pp. 12, 13, *supra*).

C. The decision of the Circuit Court does not conflict with any decision of this Court or any other Circuit Court.

Petitioner claims that the decision of the Circuit Court in this case conflicts with the decisions of other Circuits in *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2nd 738 (C. C. A. 3rd, 1945), *Bigelow* v. *RKO Radio Pictures*, 150 F. 2nd 877 (C. C. A. 7th, 1945), *American Tobacco Co.* v. *United States*, 147 F. 2nd 93 (C. C. A. 6th, 1944), and of this Court in the latter case (328 U. S. 781 (1946)). This contention is without merit.

In all of the aforecited cases the findings of conspiracy, price fixing, etc., were made only after a full trial on the merits. In all these cases voluminous factual matter was submitted to the Court supporting the ultimate determination that violations of the Anti-Trust Laws had occurred. It was only after the factual context had been clearly supplied that the Court applied the legal principles espoused by petitioner in this case. Petitioner seeks the application of these principles on the basis of a few affidavits containing factual disputes as to the critical elements of the case and in the absence of any judicial determination of these facts.

To contend that the decision of the Circuit Court in this case conflicts with decisions in which legal principles were applied only after the facts were judicially determined completely overlooks realities. The petition herein prays that this Court apply legal principles to factual abstractions. That is not the purpose of review by this Court by writ of certiorari.

CONCLUSION

The petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 140

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner,

v.

AMERICAN BROADCASTING CO. and MUTUAL BROADCASTING SYSTEM,
Respondents.

Memorandum on Behalf of Mutual Broadcasting System, Inc., Respondent, in Answer to Memorandum for the United States as Amicus Curiae in Support of the Petition for Writ of Certiorari

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We feel that respondent's main brief clearly demonstrates the impropriety of review at this time. However, the misconceptions as to the opinion of the Court of Appeals contained in the Solicitor General's memorandum (hereinafter referred to as "memorandum"), constrain us to file this reply.

The Solicitor General urges the granting of certiorari on the ground that the opinion of the Court below announced certain erroneous broad principles of anti-trust law. This claim, however, is founded upon a fundamental misconception of the opinion's true scope and purport.

The memorandum contends that the Court of Appeals announced the principle that the FCC Chain Broadcasting Regulations sanction violation of the Anti-Trust Laws. This contention is based on the refusal of the Court below to accept as a basis for preliminary injunction petitioner's unsubstantiated allegations that the affiliation agreements between the networks and the stations are illegally "exclusive". The only support for this view consists of isolated statements of the Court below which the memorandum incompletely quotes out of context. To avoid any misapprehensions the full statement of the Court below, in declining to find that the affiliation agreements were "exclusive" and per se illegal, is set forth herein:

> "We think it improper to grant a preliminary injunction upon the charge that the networks have unlawful 'exclusive' contracts with their stations where the Federal Communications Commission, after protracted hearings and consideration not only of the general public interest but of the Sherman Anti-Trust Act, has specifically sanctioned many of the important terms of the affiliation contracts at present in use and the defendants have given reasonable grounds for denying their exclusiveness or illegality" (R. 170, fol. 172).

The Court of Appeals' denial of preliminary injunction was based on a number of factors, namely: (a) that petitioner had failed to substantiate its bare allegations that the affiliation agreements created exclusive or illegal relationships between the networks and their stations, (b) that respondent had provided "reasonable grounds for denying their [the affiliation agreements] exclusiveness or illegality" (R. 170, fol. 172); (c) that the affiliation agreements complied in all respects with the FCC Chain Broadcasting Regulations, which were intended to prohibit and do prohibit "exclusive" arrangements between the networks and their affiliated stations (see Respondent's main brief, p. 5).

There is nothing in the statement quoted above which conflicts with the principle approved by this Court that the FCC was "not charged with the duty of enforcing" the Sherman Act. *National Broadcasting* v. *U. S.*, 319 U. S. 190, 223. The Court of Appeals, however, properly gave weight to the principle likewise approved by this Court, that the FCC, "although not charged with the duty" of enforcing the Sherman Act, was under a duty "to administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve". *National Broadcasting* v. *U. S.*, supra, at p. 223. The recognition of this principle by the Court below as one of the factors militating against a preliminary injunction, in no way indicated or implied an adoption of the view that the Chain Broadcasting Regulations grant immunity against anti-trust prosecution.

Equally untenable is the Solicitor General's contention the Court below held that the networks have an inherent right to fix the rates at which independent stations may offer their facilities to advertisers (Memorandum, p. 5).

No contention was made below by petitioner that the networks sought to fix the rates to be charged by the local stations for the latter's own facilities. The sole issue with regard to price-fixing revolved around petitioner's claim that the networks should have no voice in determining the rate at which *national network time* should be sold to a national advertiser, in spite of the fact that the sale of such time involves not only the aggregate facilities of the stations comprising the network, but also the facilities of the network itself (Respondent's main brief, pp. 11, 12).

The Court below merely rejected the contention of petitioner that it had an inherent right to set its own network rate to an advertiser and in all other respects to use the facilities of the network, without any voice by the network as to the terms under which such facilities

would be made available (Respondent's main brief, pp. 11, 12, 19, 20).

Contrary to the statement in the memorandum, and as pointed out in our main brief (pp. 8-13, 17, 19-22), there is no erroneous expression of substantive law in the opinion below which would prevent petitioner from attempting to produce evidence of violation of the Anti-Trust Laws upon the trial of this action. The Court below properly limited its determination to the question of whether or not the District Court abused its discretion in denying the extraordinary relief sought. The legal principles discussed in respondent's brief which demonstrate the inappropriateness of review of the interlocutory discretionary order at this time, are clearly applicable (Respondent's main brief, pp. 14-22).

The attempt to inject into the litigation at this preliminary juncture legal issues which were neither before, nor decided by, the Courts below would serve neither the interests of the public or the parties. Conceding, arguendo, that "serious issues" may ultimately be involved, they cannot properly and should not be determined on the basis of a few affidavits. The factual disputes about which these issues revolve are many and complex and their resolution by trial is indispensable to proper judicial determination. The granting of certiorari at this stage would be contrary to established principles and would only result in a premature review of legal abstractions.

The petition for certiorari should accordingly be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 140.

FEDERAL BROADCASTING SYSTEM, INC.

v.

AMERICAN BROADCASTING CO., INC. and
MUTUAL BROADCASTING SYSTEM

REPLY MEMORANDUM OF RESPONDENT AMERICAN BROADCASTING COMPANY, INC., TO AMICUS CURIAE MEMORANDUM FOR THE UNITED STATES.

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REPLY MEMORANDUM OF RESPONDENT AMERICAN BROADCASTING COMPANY, INC., TO AMICUS CURIAE MEMORANDUM FOR THE UNITED STATES.

The Memorandum for the United States, in support of the petition for certiorari, proceeds on the same misconception relied upon by Petitioner. It, too, mistakenly assumes that the Court of Appeals decided the legality of network affiliation agreements used in the broadcasting industry and the merits of Petitioner's allegations of conspiracy by the four network defendants to violate the antitrust laws. In fact, the court below determined only that the District Court had not abused its discretion in denying the request for preliminary injunction against two of the defendants, the Respondents herein, particularly when the record indicated that each had acted independently and pursuant to express provisions of its own written agree-

ment with Petitioner. Petitioner's right to prove on trial the alleged violations of the antitrust laws is in no way prejudged or prejudiced by the District Court's denial of the preliminary injunction or the Circuit Court's opinion affirming the same. Petitioner was thereby simply put to the necessity of establishing its case by probative evidence. It lost at most the possibiliy of avoiding that burden by means of a preliminary injunction which it perhaps hoped would induce, if not compel, these Respondents to accede to its demands without waiting for determination of the issues after trial.

The memorandum for the United States ascribes to the lower court a ruling that ordinary network affiliation contracts[1] could not be deemed violative of the antitrust laws because the Federal Communications Commission, in its Chain Broadcasting Report, had adjudicated that question and approved such contracts. That the lower court made no such ruling is apparent from a reading of the entire paragraph which the memorandum of the United States quotes only in part. Taken out of context, such partial quotation is misleading. This is what was said (R. 170):

> "*We think it improper to grant a preliminary injunction* upon the charge that the networks have unlawful 'exclusive' contracts with their stations where the Federal Communications Commission, after protracted hearings, and consideration not only of the general public interest but of the Sherman Anti-Trust Act, has specifically sanctioned many of the important terms of the affiliation contracts at present in use and *the defendants have given reasonable grounds for denying exclusiveness or illegality.* See F.C.C. Report on Chain Broadcasting, Comm. Order No. 37, Docket No. 5061 May 1941, p. 46; National Broadcasting Co. v. United States, 319 U.S. 190, 223, 63 S. Ct. 997, 87 L. Ed. 1344." (Emphasis supplied.)

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[1] As the record shows, Petitioner in the past obtained network programs from both Respondents on preferential terms, which it exacted by means of its monopolistic position in the Rochester market. R. 67-68, 71-73, 82-84, 115.

The full passage in nowise permits any claim that the lower court either disregarded the plain declaration of Section 313 of the Communications Act of 1934 that the antitrust laws are "applicable to . . . radio communications" (48 Stat. 1087, 47 U.S.C. § 313) or misread the opinion of this Court in *National Broadcasting Company* v. *United States,* 319 U. S. 190, 223, 63 S. Ct. 987, 1012, to mean that the F. C. C. had jurisdiction to exempt the practices of radio networks from the application of the antitrust laws. Rather, the opinion below on its face simply reflects the application of the traditional test of the propriety of interim relief—whether the proponent has made a sufficient preliminary showing that the relevant facts and material principles of law were such that he would ultimately prevail. The ruling was simply that preliminary relief could not properly be granted because there was no persuasive evidence of any conspiracy, or as to whether the assailed contracts were in fact exclusive or that they were to be condemned under antitrust law.

The reason for the insufficiency of the record with respect to the asserted exclusiveness of the affiliation contracts is doubtless the limited focus of the prayer for preliminary relief, which rests solely upon an asserted conspiracy between the two respondent networks to boycott Petitioner's station (R. 22). It followed that the affidavits which comprise the record concentrated primarily upon that issue.

Moreover, whether contracts which are in fact "exclusive" violate the antitrust laws can only be determined upon analysis of all of the relevant circumstances. *United States* v. *Columbia Steel Company,* U. S. , 68 S. Ct. 1107, 1121-1123. Since only two of the four national networks are parties in this interlocutory proceeding, the requisite basis for such a determination, even tentatively, is lacking.

In the present posture of the case it is premature to raise issues as to the allegedly monopolistic features of the "pattern of conduct pursued by the four national net-

works". (Memorandum for United States, p. 5). This would extend the case far beyond the conspiracy confines in which Petitioner chose to focus its prayer for interlocutory relief. Questions of such magnitude cannot appropriately be decided upon a record comprised solely of conflicting affidavits and in the absence of the two other networks.

A false note is injected by the denial that networks have "an inherent right to fix the rates at which independent stations may offer their facilities to the advertiser". (*Ibid.*) The Court made no such finding as a reading of its opinion will disclose. No one challenges the right of a station licensee to set its own price for time over its facilities to anyone—network, national advertiser, local advertiser or anybody else. What the lower court denied, and properly so, was that a station owner had a right to compel acceptance of his price by any buyer, including the networks, which are by no means the only outlets for the sale of radio time.

The issues raised in the Memorandum of the United States should be reserved for consideration until the formulation of a complete and reliable record by a full trial, with all four defendant networks participating.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 140

FEDERAL BROADCASTING SYSTEM, INC., PETITIONER

v.

AMERICAN BROADCASTING CO., INC., AND MUTUAL BROADCASTING SYSTEM

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, licensee of radio broadcast station WSAY in Rochester, New York, brought suit under Section 7 of the Sherman Act and Section 16 of the Clayton Act against the four national radio broadcast networks to recover threefold damages for injury sustained by reason of alleged violations of Sections 1 and 2 of the Sherman Act, and to enjoin their continuance. The district court refused petitioner's motion for a preliminary injunction to maintain the *status quo pendente lite* by restraining respondents' American Broadcasting Company, Inc., and Mutual Broadcasting Sys-

tem from withdrawing from petitioner's station WSAY the programs of those two networks then being broadcast by it. The Court of Appeals affirmed the district court's ruling in an opinion of broad scope, assigning grounds for the decision which may have an important bearing on the application of the antitrust laws to the radio broadcast field.[1]

The Government is of the view that the opinion of the lower court, if uncorrected, may prove to be both an important obstacle to future public enforcement of the antitrust laws and a serious deterrent to the institution of private suits which might otherwise serve as an important supplementary aid in preventing monopolizations and trade restraints. The Government therefore believes that it is in the public interest that the petition for a writ of certiorari be granted.

In our view, the principal and important error of the opinion below stems from the court's misconception of the Federal Communications Commission's regulations, adopted pursuant to its Report on Chain Broadcasting (Comm. Order No. 37, Docket No. 5061, issued May 1941), the validity of which was sustained by this Court in *National Broadcasting Co.* v. *United States,* 319 U. S. 190. Petitioner had challenged the terms of the affilia-

[1] Since the expressions as to the substantive law contained in the opinion below will be controlling in the trial of this case on the merits, the case is not governed by the principle against reviewing interlocutory orders.

tion contracts between networks and individual stations as unlawful of themselves and in their cumulative effect. The court below rejected this challenge, and declared that "the Federal Communications Commission, after * * * consideration * * * of the Sherman Anti-Trust Act, has specifically sanctioned many of the important terms of the affiliation contracts * * *".

This determination, one of serious import, is unfounded. The Commission manifestly lacks power to "sanction" practices violative of the Sherman Act, and thus partially to repeal that Act by modifying its application to the radio broadcast field. In the Communications Act of 1934, creating the Commission and defining its powers, Congress convincingly expressed an intention, not to impair, but to strengthen the application of the antitrust laws to the radio broadcast field by imposing additional penalties for their violation. (See Sections 311, 313 of the Communications Act of 1934, 48 Stat. 1086, 1087, 47 U. S. C. 311, 313). The Commission has no statutory authority to regulate the networks as such, except to the extent that they may also be licensees of broadcast stations. The regulations which the Commission issued operate only upon individual broadcast stations by providing that the Commission will not grant licenses to those who enter into contractual arrangements containing specified restrictive terms effectively hampering their ability to operate in the public interest. The regulations thus sanctioned nothing.

They were merely an indication of the manner in which the Commission would thereafter exercise its power to grant or deny applications for licenses to operate individual stations.

Moreover, it is plain that the Federal Communications Commission not only lacked the power to condone the practices of the national networks, but did not intend, by the formulation of its regulations applicable to chain broadcasting, to "sanction" practices otherwise violative of the antitrust laws. This Court quoted with approval the Commission's view in its Report that "the prohibitions of the Sherman Act apply to broadcasting" and that the Commission was "not charged with the duty of enforcing that law". *National Broadcasting Co.* v. *United States, supra,* at 223. The Commission shares the Government's concern at the implications of the present decision. In a letter to the Department of Justice suggesting the advisability of the Government's supporting the petition for certiorari, it stated that "the language of the Court of Appeals * * * appears to reflect a serious misapprehension as to the intent and scope of the Commission Chain Broadcasting Regulations."

Petitioner objected below to the provisions commonly found in affiliation contracts which permit the national networks from time to time to fix the rates at which their respective affiliated stations will be offered by them to advertisers. The court below disposed of petitioner's objection on the

theory that it "had no inherent right to set its own rate to an advertiser and in all other respects to use the facilities of the radio network * * *". The court here took far too narrow a view of the issues before it. The Sherman Act was designed to assure that the market in any given field would not be preempted by monopolistic and trade-restraining conduct such as that here charged to respondents. *International Salt Company* v. *United States,* 332 U. S. 392. And the conduct of each network may be in restraint of trade irrespective of a showing of joint action. Whether or not the pattern of conduct pursued by the four national networks has effected a monopolization of the market and unlawfully circumscribed the ability of independent stations to compete, raises serious issues. It certainly is not true that the national networks have an inherent right to fix the rates at which independent stations may offer their facilities to the advertisers.

Two factors distinctive to the radio broadcast field render it particularly important that the antitrust laws be unimpaired in their application to the field. In the first place, radio broadcasting is a method of mass communication of immense importance to a democratic society, where monopolizations or trade restraints would be peculiarly menacing. See Frankfurter J., concurring in *Associated Press* v. *United States,* 326 U. S. 1, 27-28. In the second place, the fact that there are physical limitations on the number of stations makes it par-

ticularly desirable that no artificial restrictions upon competition be added to those imposed by nature. *National Broadcasting Co.* v. *United States, supra* at 218.

The Government respectfully submits that under the circumstances of the present case the petition for a writ of certiorari should be granted.

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